



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 168437

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Pursuant to petition filed September 3, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Wednesday, October 14, 2015 at 11:45 AM at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
██████████  
██████████

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**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The respondent (CARES # ██████████) is a resident of Milwaukee County.
2. On September 9, 2015, OIG prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent intentionally violated the rules of the FoodShare program on May 17, 2015, by making a \$20.73 purchase with her deceased mother's EBT card. (Exhibit 9)
3. Respondent's mother passed away May 14, 2015. (Exhibit 4B, testimony of Respondent)

4. On May 17, 2015, the Respondent attempted to make a \$23.24 purchase with her own EBT card, but did not have enough money. Out of a desperate need to feed her family she used her deceased mother's card. (Testimony of Respondent)
5. The Respondent's mother was elderly and not in good health, so the Respondent filed for benefits for her mother and did her mother's grocery shopping for her. (Testimony of the Respondent)

## **DISCUSSION**

### *What is an Intentional Program Violation?*

7 C.F.R. §273.16(c) states that Intentional Program Violations "shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device)."

The Department's written policy restates federal law, below:

#### **3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook, §3.14.1.*

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

### *What is OIG's burden of Proof?*

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been shown.

#### *The Merits of OIG’s Case*

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent intentionally violated the rules of the FoodShare program by using her deceased mother EBT card and making a \$20.73 purchase.

The unauthorized use of FoodShare benefits can subject a person to Federal prosecution under sections 15(b) and (c) of the FoodStamp Act. 7 CFR 271.5(b) Specifically, where the unauthorized use is under \$100, a guilty party may be fined up to \$1000 and imprisoned for up to one year. 7 CFR 271.5(b)(1). The unauthorized use of FoodShare benefits can also subject a person to criminal prosecution under state law, with the same potential penalties. Wis. Stats. §49.795(6) and (8).

Thus, intentionally engaging in the unauthorized use of FoodShare benefits would constitute an intentional program violation.

The Respondent does not dispute the fact that she used her deceased mother’s EBT card, nor does she dispute the fact that she was not part of her mother’s FoodShare household. However, the Respondent testified, credibly, that she did not act with the intent to violate any FoodShare rules. The Respondent testified that she was still grieving her mother’s death, three days earlier, that she needed to get her family fed, was having problems with her own EBT card and out of desperation used her mothers.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977).

The Respondent gave credible testimony rebutting the presumption that she acted with intent to violate the rules of the FoodShare program. OIG has presented no evidence to refute the Respondent's testimony. On the contrary, the Respondent's testimony is corroborated by the EBT transaction detail printouts in Exhibit 2C.

Consequently, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program.

### **CONCLUSIONS OF LAW**

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program.

**NOW, THEREFORE, it is ORDERED**

IPV case number [REDACTED] is hereby reversed.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

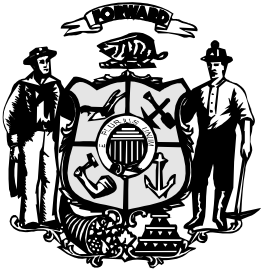
Given under my hand at the City of Milwaukee, Wisconsin,  
this 11th day of November, 2015.

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\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
Kevin Rinka - email





## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 11, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
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